STATE OF MICHIGAN
IN THE
SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
W. WHITBECK, C.J., R. GRIFFIN, and D. OWENS, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

-vs-

Supreme Court
No. 123760

TARAJEE SHAHEER MAYNOR,

Defendant-Appellee.
_____/

Court of Appeals No. 244435
Circuit Court No. 2002-185279-FC

REPLY BRIEF ON APPEAL-APPELLANT

ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

The People incorporate the jurisdictional statement from their Appellant's Brief.

STATEMENT OF QUESTION PRESENTED

I. WHETHER READING THE STATUTORY LANGUAGE OF CHILD ABUSE IN THE FIRST DEGREE, MCL 750.136b(2), IS SUFFICIENT TO INFORM THE JURY OF THE REQUIRED MENS REA?

Defendant contends the answer is "No."

The People contend the answer is "Yes."

The district court ruled that child abuse in the first degree was a specific intent crime.

The circuit court ruled that child abuse in the first degree was a general intent crime.

The Court of Appeals' majority ruled that child abuse in the first degree was a specific intent crime, but concurring Chief Judge William Whitbeck concluded that child abuse in the first degree was a general intent crime.

STATEMENT OF FACTS

The People incorporate the statement of facts contained in their Appellant's Brief.

ARGUMENT

I. READING THE STATUTORY LANGUAGE OF CHILD ABUSE IN THE FIRST DEGREE, MCL 750.136b(2), IS SUFFICIENT TO INFORM THE JURY OF THE REQUIRED MENS REA.

Defendant argues that the cases cited in *People v Gould,* 225 Mich App 79; 570 NW2d 140 (1997), *lv den and vacated in part* 459 Mich 955 (1999), and *People v Sherman-Huffman,* 241 Mich App 264; 615 NW2d 776 (2000), *aff'd in part on another ground* 466 Mich 39; 642 NW2d 339 (2002), support a conclusion that child abuse in the first degree is a specific intent crime. In particular, defendant relies on *People v Lerma,* 66 Mich App 566; 239 NW2d 424 (1976), *lv den* 396 Mich 848 (1976). While defendant correctly quotes *Lerma,* he fails to point out that *Lerma* has been criticized and distinguished in *People v Laur,* 128 Mich App 453; 340 NW2d 655 (1983), and in *People v Watts,* 133 Mich App 80, 82-83; 348 NW2d 39 (1984), *lv den* 419 Mich 938 (1984). Indeed, *Lerma, supra,* is not a child abuse case and for the reasons set forth in the People's brief, they submit that child abuse in the first degree is a general intent crime.

Defendant next argues that use of the word "knowingly" creates a specific intent crime. The People would note that Court of Appeals' Chief Judge Whitbeck discussed the various interpretations which that court has adopted regarding the use of the word "knowingly". *People v Maynor,* 256 Mich App 238, 251-257; 662 NW2d 468 (2003)(Whitbeck, CJ, concurring), *lv gtd* 468 Mich 943 (2003). Indeed, the People submit that for the reasons set forth in their original brief on pages 16 and 17, "knowingly" refers to the defendant's conscious awareness of committing the act, not the knowledge that a particular result will follow from it.

Defendant's argument regarding the timing of the legislation and *Gould*, which the Court of Appeals' majority relied upon, is mistaken as is pointed out by Chief Judge Whitbeck's concurrence in *Maynor, supra,* 261, and as discussed in the People's brief on appeal on page 14. See also legislative history for 1999 SB 315.

Defendant further supports his argument that "the term 'knowingly' elevates First Degree Child Abuse to a specific intent crime", Appellee's Brief, 9, by citing two Texas cases. *Id.* Unfortunately, defendant fails to reveal that culpable mental states are specifically defined by Texas statute. See Texas Penal Code §§1.07(28)-(29) and 6.03. See also *Beggs v State,* 597 SW2d 375 (Tex App, 1980). Michigan has no such legislative definitions.

Defendant next argues that the Model Penal Code definitions should apply. The People would note that defendant raised this issue for the first time in the Court of Appeals and, in their response, the People noted and again note that this Honorable Court declined to adopt the Model Penal Code definitions in *Sherman-Huffman* even though it had originally ordered that issue to be briefed. *People v Sherman-Huffman,* 463 Mich 978; 623 NW2d 603 (2001). Indeed, it is for the Legislature to adopt the Model Penal Code definitions if it chooses to do so, but it has not and this Honorable Court should not impose the definitions contained in the Model Penal Code to the child abuse in the first degree statute when it contains a definitional section.

Defendant also contends that other states' cases support her contention that child abuse in the first degree is a specific intent crime. Defendant relies upon *Mullen v United States,* 263 F2d 275; 105 US App DC 25 (1958), and *Carson v United States,* 556 A2d 1076 (CA DC, 1989), which contained language similar to Michigan's prior child abuse statutes. The problem is that Michigan law has previously held that child cruelty was a general intent crime. *People v Jackson,* 140 Mich App 283, 286-287; 364 NW2d 310 (1985), *lv den* 423 Mich 859 (1985);

People v Alderete, 132 Mich App 351, 356; 347 NW2d 229 (1984). Moreover, the People would add that the District of Columbia's child abuse statute has been amended and the appellate court has not construed its current mens rea requirement. *Newby v United States,* 797 A2d 1233, 1241 n 10 (CA DC, 2002).

Likewise, defendant's reliance on *Jukubczak v State,* 425 So2d 187 (Fla App, 1983), is also misplaced and defendant fails to note that *Jukubczak* was disproved insofar as it held that only acts of commission rather than omission could constitute aggravated child abuse. *Nicholson v State,* 600 So2d 1101 (Fla, 1992), *cert den* 506 US 1008; 113 S Ct 625; 121 L Ed 2d 557 (1992). While defendant wants to keep labeling her conduct "negligent" at best and "inaction" or "omission" at worst, defendant's actions were intentional and, as stated by Judge Potts, the result (*i. e.,* the death of two children) was the only outcome. Defendant also forgets that the child-abuse statute itself defines "omission", MCL 750.136b(1)(c), and defendant's acts do not qualify under that definition.

Furthermore, defendant's reliance on *State v Parks,* 253 Neb 939; 573 NW2d 53 (1998), is also misplaced. Nebraska's statute provided in pertinent part:

> (1) A person commits child abuse if he or she knowingly, intentionally, or negligently causes or permits a minor child to be:
>
> * * *
>
> (b) . . . cruelly punished.
>
> * * *
>
> (3) Child abuse is a Class I misdemeanor if the offense is committed negligently.
> (4) Child abuse is a Class IV felony if the offense is committed knowingly and intentionally and does not result in serious bodily injury as defined in section 28-109.
> (5) Child abuse is a Class III felony if the offense is committed knowingly and intentionally and results in serious bodily injury as defined in such section.
> (6) Child abuse is a Class 1B felony if the offense is committed knowingly and intentionally and results in the death of such child.

Parks, supra, 946. The defendant claimed that he negligently caused the injury and was entitled to the lesser-included misdemeanor instruction. *Id.* at 944. In *Parks,* the state had argued that the defendant's state of mind was controlling in order to attempt to evade the application of the lesser-included instruction rule. *Id.* Nebraska's Supreme Court agreed that the state of mind was the distinguishing factor, but disagreed that the lesser-included offense instruction need not be given.

Here, the People are not agreeing that the defendant's state of mind is controlling. Indeed, the People find it interesting that in *Parks* the Nebraska Supreme Court discussed the "state of mind" with which the act was committed, but what it went on to describe was the manner in which the act was committed, not the defendant's state of mind in committing it. *Id.* at 949-950.

Defendant also cites *State v Byrd,* 309 NC 132; 305 SE2d 724 (1983), for the proposition that violation of a child-abuse statute which proximately causes a child's death would support a conviction for involuntary manslaughter. Defendant fails to mention that the defendants were convicted of involuntary manslaughter and that is why the Court discussed that offense. Defendant also does not reveal that *Byrd* was overruled in part in *State v Childress,* 321 NC 226, 232; 362 SE2d 263 (1987), to the extent that it held that an inference could not be based upon an inference. In any event, the People continue to rely on *State v Campbell,* 316 NC 168; 340 SE2d 474 (1986), which is cited on page 21 of their Appellant's Brief, which held a defendant need not specifically intend the injury to the child to be serious.

As appellant discussed in its original brief, other states' statutes often contain their own definitional sections and their own language. As such, when a comparison is made between Michigan's statute and other states' statutes, it must be done carefully with due consideration given to the exact wording of the other states' statutes and applicable definitional sections.

Defendant goes on to discuss various hypotheticals, which do not involve the facts in this case and, in any event, are easily distinguishable. Leaving a child unattended in a bathtub with "a few inches of water" in it and taking a telephone call may be negligent or it may be criminal if the parent knows that the child cannot sit up and will fall into water deep enough to cover it. Regarding infanticide and child abuse, the Tenth Circuit Court of Appeals has noted:

> Such a child is too young, if he survives, to relate the facts concerning the attempt on his life, and too young, if he does not survive, to have exerted enough resistance that the marks of his cause of death will survive him. Absent the fortuitous presence of an eyewitness, infanticide or child abuse by suffocation would largely go unpunished.

United States v Harris, 661 F2d 138 (CA 10, 1981)(quoting *United States v Woods,* 484 F2d 127, 133 (CA 4, 1973), *cert den* 415 US 979; 94 S Ct 1566; 39 L Ed 2d 875 [1974]).[1] See also *People v Burns,* 250 Mich App 436; 647 NW2d 515 (2002), where the defendant was charged for the murder of his eleven month-old daughter by forcing a plastic ice cube down her throat, even though years earlier the death had been ruled accidental based on the defendant's statement

[1]For example, in *State v Harris,* 39 Misc2d 193; 240 NYS2d 503 (1963), the defendant was charged with first-degree murder for the death of her thirty-month old child by placing a plastic bag over his head. Four years earlier, the death was ruled an accident based on the defendant's statements that the child crawled inside a garment bag and zipped it. Subsequently, the defendant wrote a letter to her husband which stated:

> There is something I would only admit to you and no one else, but the death of my baby was no accident. I fooled you and I fooled the police, and I am sorry that it ever happened. But when I put the bag over the baby's head I couldn't stop. And I didn't want to stop. I don't know why I did this. . . .

Id. at 505. The Court regretfully dismissed the charge, ruling that the letter was inadmissible under the marital privilege. See also *State v Garcia,* 165 Ill2d 409, 418-419; 651 NE2d 100, 105; 209 Ill Dec 172 (1995), where the defendant confessed to intentionally killing her eleven-month old daughter four years earlier and the death had originally been ruled accidental because the defendant told police that her daughter had wrapped herself around a plastic bag and suffocated.

that his daughter had accidentally swallowed the cube after it had been given to her for teething purposes.

Defendant's second proposed "hypothetical" concerns a mother who momentarily leaves a child inside a car while she goes to get the mail.[2] Again, this situation is distinguishable from what occurred in this case. Here, defendant knowingly and intentionally left her three-year old son and ten-month old daughter in a black Neon in sweltering heat for approximately four hours aware that the child safety locks were engaged and that the children could not escape.

Defendant's third hypothetical involves failing to properly buckle a child's seatbelt or failing to properly set up a car seat. The People would again submit that such acts are different from the intentional and knowing act engaged in by this defendant and, in fact, defendant's children were buckled into a seat belt and car safety seat. The People would note that defendant's proposed scenario was recently addressed in this Honorable Court's denial of leave in *People v Cameron,* _ Mich _; _ NW2d _ (2003), where the Court of Appeals had held that, even if child abuse in the second degree was a general intent crime, the People had failed to establish that the defendant's act of driving her car backward into an intersection in a residential area when her children were unbuckled in the back seat was not "'likely' to cause serious physical or mental harm to a child regardless of whether" harm resulted. *People v Cameron,* unpublished per curiam opinion of the Court of Appeals (Docket No. 246209, rel'd August 26, 2003).

[2] The People would note that defendant's scenario assumes a well-coordinated child who can maneuver both a gear shift and a brake. It also does not specify if the car is on an incline or whether it is running and it assumes independent action by the child resulting in the harmful situation.

Defendant also argues that the legislative history of the Public Act which added first-degree child abuse to the felony-murder statute makes child abuse in the first degree a specific intent crime. The People would again note that they only have to show the commission of the felony and second-degree murder. *People v Magyar,* 250 Mich App 408, 412-412; 648 NW2d 215 (2002), *lv den* 467 Mich 949 (2003). See also *State v Godsey*, 60 SW2d 759, 778-781 (Tenn, 2001), where the Tennessee Supreme Court upheld the death penalty for felony murder committed during the course of aggravated child abuse, noting that five other states had likewise approved the death penalty when the victim was a child. In doing so, the Tennessee Supreme Court noted that the legislature had recognized the discrepancy in size, strength, and ability between the victim and the assailant, as well as the heightened vulnerability of younger children, who, generally are less able to defend themselves, describe their assailant, seek assistance, flee the attack, or even to articulate the nature of the crime. *Id.* at 778.

Certainly, beating a child is most recognizable form of first-degree child abuse; however, it is not the only one.

Moreover, as discussed above, defendant's conduct was neither "negligent" nor an "omission", it was intentional and the death of two children was the only outcome.

Defendant further appears to argue that child abuse must be a specific intent crime because the other portions of the act passed at the same time were specific intent crimes. Defendant is mistaken that all major controlled substances are specific intent crimes, see generally *People v Mass,* 464 Mich 615; 628 NW2d 540 (2001), and, indeed, the People would submit that the killing of a peace or corrections officer is a general intent crime as well. See and compare *People v Herndon,* 246 Mich App 371, 385-388; 633 NW2d 376 (2001), *lv den* 465 Mich 970 (2002). In addition, the People note that nine other predicate felonies under the felony-

murder statute are general intent crimes, including carjacking, *People v Davenport,* 230 Mich App 577, 581; 583 NW2d 919 (1998), *lv den* 450 Mich 1003 (1999); first-degree criminal sexual conduct (CSC), *People v Langworthy,* 416 Mich 630, 645; 331 NW2d 171 (1982), second-degree CSC, *People v Piper,* 223 Mich App 642, 646-647; 567 NW2d 483 (1997), and *People v Fisher,* 77 Mich App 6, 12-13; 257 NW2d 250 (1977), third-degree CSC, *People v Corbiere,* 220 Mich App 260, 266; 559 NW2d 666 (1996), some types of kidnapping, *People v Jaffray,* 445 Mich 287, 298; 519 NW2d 108 (1994), some forms of arson, *People v Nowack,* 462 Mich 392, 406-407; 614 NW2d 78 (2000), some forms of major controlled substance offenses, *Mass, supra,* one type of home invasion in the first-degree and second-degree, *People v Loop,* unpublished per curiam opinion of the Court of Appeals (Docket No. 226962, rel'd February 8, 2002).

Defendant further argues that there must be something "heinous" about her act. The People disagree that the felony-murder statute requires a heinous act; instead, felony-murder only requires the underlying felony plus a second-degree murder. *Magyar, supra.* In any event, defendant's actions fit the definition of heinous which she has provided. Defendant decided on a sweltering hot day to leave two helpless children locked inside a car for hours upon end. The children's body temperatures rose, they vomited and, ultimately, died.[3]

[3] For the symptoms of hyperthermia, see generally *Kotler v Alma Lodge,* 63 Cal App 4th 1381; 74 Cal Rptr 2d 721 (1998), *rev den* 1998 Cal LEXIS 5742 (1998), which indicates that it requires some time for the body's temperature to rise and that symptoms include mental confusion, unresponsiveness, lethargy, looking flushed and shortness of breath.

RELIEF

WHEREFORE, David G. Gorcyca, Prosecuting Attorney in and for the County of Oakland, by Anica Letica, Assistant Prosecuting Attorney, respectfully requests that this Honorable Court hold that child abuse in the first degree is a general intent crime and require the jury to be instructed consistently with the statutory language contained in MCL 750.136b(2) or grant any other relief which this Honorable Court deems appropriate.

Respectfully submitted,

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DATED: December 15, 2003

STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

-vs-

Supreme Court
No. 123760

TARAJEE SHAHEER MAYNOR,

Defendant-Appellee.
_____/

STATE OF MICHIGAN)
)SS
COUNTY OF OAKLAND)

PROOF OF SERVICE

Laurie Wakerley being duly sworn, deposes and says that on the 15th day of December, 2003, she served two (2) copies of Reply Brief on Appeal - Appellant upon Elbert L. Hatchett, at Hatchett, DeWalt & Hatchett, 485 Orchard Lake Avenue, Pontiac, Michigan 48341; and one (1) copy of Reply Brief on Appeal - Appellant, upon Michael A. Cox, Attorney General, G. Mennen Williams Building, 7th Floor, 525 W. Ottawa, P.O. Box 30212, Lansing, Michigan 48909, by placing same in envelopes with the Oakland County mailing pick-up service.

Further deponent saith not.

Laurie Wakerley
LAURIE WAKERLEY, Deponent

Subscribed and sworn to before me,
this 15th day of December, 2003.

RAE AN RUDDY, Notary Public
Oakland County, Michigan
My Commission Expires: 02/03/05